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IN THE

**Supreme Court of the United States**

**October Term, 1964**

**No. 491**

CORLISS LAMONT, doing business as  
BASIC PAMPHLETS,

*Appellant,*

v.

THE POSTMASTER GENERAL OF THE  
UNITED STATES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR THE APPELLANT**

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**BRIEF FOR THE APPELLANT**

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**Opinions Below**

The opinions below (R. 18) are reported at 229 F. Supp. 913.

**Jurisdiction**

The judgment below (R. 35) was dated and entered on May 19, 1964. Appellant filed a notice of appeal in the Court below on June 17, 1964 (R. 37).

The District Court had jurisdiction under 28 U. S. C. 1331, 1339, 1356, 2201-2202, 2282 and 2284, and under Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009.

Following the filing of a jurisdictional statement in this Court, the Government moved to affirm the judgment

of the District Court. It recognized the substantiality of appellant's constitutional claim on the merits, but argued that in certain respects the action was moot and that in others it was not ripe for adjudication. Appellant filed a brief in opposition. While the Government's motion was pending, a statutory court in the United States District Court for the Northern District of California held that the statute, 39 U. S. C. 4008, was unconstitutional for the reasons urged by the appellant in the present case. *Heilberg v. Fixa* (D. C. N. D. Cal., No. 41660, Nov. 16, 1964), hereinafter cited as *Heilberg*.

Both parties called the *Heilberg* decision to the attention of the Court and the Government withdrew its motion. On December 7, 1964 the Court entered an order noting probable jurisdiction and directed that the issue of mootness be discussed by counsel in their briefs and in oral argument.

### Questions Presented

1. Whether 39 U. S. C. 4008 on its face and as applied is unconstitutional because it impairs freedom of expression under the First Amendment to the Constitution, sanctions an unlawful search and seizure under the Fourth Amendment, compels self-incrimination under the Fifth Amendment, and denies due process under the Fifth Amendment.

2. Whether a case is justiciable where the Postmaster General administers the statute by listing appellant as a person requesting "communist political propaganda", with the continuing danger of official use and public disclosure of such lists, where delivery of all unsealed foreign mail addressed to appellant is delayed, and where mail addressed to all other persons whose desire for anonymity precludes lawsuits or requests for mail considered "communist political propaganda" is withheld, even though, upon institution of the present action, the Postmaster General ceased detaining appellant's mail.

## Statutes Involved

The principal statute involved is Section 305 of the Postal Service and Public Employees Salary Act of 1962, Public Law 87-793, § 305, October 11, 1962, 76 Stat. 850, 39 U. S. C. 4008 (hereinafter cited as the statute). It provides:

**“4008. Communist political propaganda**

(a). Mail matter, except sealed letters, which originates or which is printed, or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be ‘communist political propaganda’, shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee’s request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b). For the purposes of this section, the term ‘communist political propaganda’ means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U. S. C. 611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to Section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not 'communist political propaganda' addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b)."

Section 1(j) of the Foreign Agents Registration Act of 1938, 22 U. S. C. 611(j), whose definition of political propaganda is incorporated in 39 U. S. C. § 4008, provides as follows:

"(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.

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## Statement of the Case

In this action, appellant seeks a judgment declaring 39 U. S. C. 4008 unconstitutional and enjoining the enforcement of that statute.

### 1. Background <sup>1</sup>

In 1940, on the basis of an interpretation of the Foreign Agents Registration Act, 39 Ops. Atty. Gen. 535 (1940), the Post Office Department embarked upon a program of seizing and destroying Nazi propaganda upon its receipt in the United States. The program was revived with respect to Communist propaganda in 1951 during the Korean War and was continued after the armistice. By 1956 there had been sufficient protest about the program so that it was modified: an opportunity was thereafter given to addressees, who were notified by postcard that detained mail might be requested. When so requested, the mail was delivered.

On March 17, 1961 President Kennedy issued a directive abolishing the program. In a press release issued simultaneously, the President noted that the step was taken after determination that the program served neither a national security nor an intelligence function, and was injurious to our foreign policy.<sup>2</sup>

Thereafter several bills were proposed in Congress for the purpose of reimposing restrictions on propaganda

<sup>1</sup> A full historical review of the handling of foreign propaganda in the mails is found in Schwartz and Paul, *Foreign Communist Propaganda in the Mails*, 107 U. of Pa. L. Rev. 621, 796. (hereinafter cited as "Schwartz & Paul").

<sup>2</sup> Press Release, Office of the White House Press Secretary; March 17, 1961; *New York Times*, March 18, 1961, p. 8. The press release stated, in part:

"Not only has the intelligence value of the program been found to be of no usefulness, but the program also has been of concern to the Secretary of State in connection with efforts to improve cultural exchanges with communist countries."

in the mails. Congressman Cunningham introduced H. R. 9004, 87th Cong. 1st Sess. which would have denied all use of the mails to Communist political propaganda, foreign and domestic. When a comprehensive new postal rate bill came up for consideration early in 1962, it contained the Cunningham proposal, and was passed by the House. At the same time, two measures were presented to the Senate—a bill identical to the Cunningham measure and S. 2740, introduced by Senator Bush, which provided that foreign communist propaganda in the mails be detained and delivered only upon request of the person addressed.

Despite the fact that United States Government representatives and others opposed the bill<sup>3</sup>, the Senate Post Office Committee reported out H. R. 7927, containing the Bush propaganda proposal, somewhat modified. The Senate report, S. Rep. 2120, 87th Cong. 2d Sess., contained a vigorous dissent by Senator Clark. Despite strong objection by Senator Clark and others on the floor, the bill was passed as reported out, and ultimately enacted as the Postal Service and Federal Employees Act of 1962.<sup>4</sup> The Act had the effect of reinstating by statute the administrative program which President Kennedy had abolished in March 1961.

## 2. The Statute

Section 4008 provides that mailed matter, except sealed letters, originating in a foreign country and determined by the Secretary of the Treasury to be "communist political propaganda" is to be "detained" by the Postmaster

<sup>3</sup> *Hearings Before the Committee on Post Office and Civil Service of the U. S. Senate on H. R. 7927, 87th Cong. 2d Sess., 827-961.*

<sup>4</sup> A detailed legislative history is set forth in Schwartz, *The Mail Must Not Go Through*, 11 U. C. L. A. L. Rev. 805, 808-816 (cited hereinafter as "Schwartz"); and in Greenfield, *How We Got Protected from Communist Propaganda*, *The Reporter*, October 26, 1962, p. 22.

General and "delivered only upon the addressee's request", with certain exceptions, and "disposed of" in the absence of a request for delivery. The term "communist political propaganda" is defined by reference to Section 1(j) of the Foreign Agents Registration Act of 1938, as amended, 22 U. S. C. 611(j).

### 3. The Proceedings Below

Appellant is engaged in the business of publishing and distributing pamphlets and other literature on subjects of public interest (R. 10). In July 1963 he received a notice from the Post Office Department in San Francisco, California, that mail addressed to appellant, consisting of "Peking Review # 12, 1963, 1 copy" was being detained as "Communist political propaganda", pursuant to the statute. The notice advised appellant that unless a specific request was received for the mail, it would be destroyed (R. 10, 13).

Without responding to the notice, appellant brought this action. Thereupon the Acting General Counsel of the Post Office Department wrote to appellant stating that the commencement of the action was deemed to be an expression of appellant's desire to receive such mail and that postmasters at all propaganda screening points were being instructed not to detain appellant's mail (R. 5, 10).

Appellant then served the amended complaint in which he sought a preliminary and permanent injunction enjoining the carrying out or enforcement of the statute and directing the removal of appellant's name from all lists and records kept by the Postmaster General of persons desiring to receive "communist political propaganda", and a declaratory judgment that appellant is entitled to receive mail without complying with the statute, and that the statute is unconstitutional (R. 1).

Appellant moved, prior to service of an answer, for the convening of a three-judge court and for summary

judgment (R. 6). A statutory court was convened. It denied, one judge dissenting, appellant's motion for summary judgment and dismissed the amended complaint (R. 35).

#### 4. Opinions of the District Court

A majority of the District Court held that the issues were moot because the appellant's mail was no longer being detained; that the maintaining of appellant's name on lists of persons desiring political propaganda did not present a question ripe for determination in the absence of actual disclosure; and that the appellant had no standing to challenge the statute on behalf of other persons.

The dissenting opinion of District Judge Feinberg concluded that appellant's claim was ripe in view of the possibility of disclosure and the probable lack of opportunity to raise the issue before the injury occurred. Judge Feinberg was of the opinion that the issues were not moot since the delivery of the mail to appellant did not vitiate the existence of the lists, the effect of which presented justiciable issues. The dissent also reasoned that appellant should be permitted to challenge the statute on behalf of other persons. In addition, Judge Feinberg questioned the Government's policy of mooting all actions attacking the statute, particularly since First Amendment rights were involved.

### Summary of Argument

#### I.

On many occasions this Court has affirmed under the First Amendment the broad right to distribute literature. The right to receive is included in the scope of the protection because receipt furthers the primary policies underlying the Amendment—the attainment of truth and widespread participation in decision making. That the material in question may be described as “communist political

propaganda" is not pertinent for "the Constitution protects expression and association without regard \* \* \* to the truth, popularity or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U. S. 415, 444-45. Likewise, it is clear that the congressional power over the mails is not absolute but is limited by the full reach of the First Amendment.

A. The statute establishes the kind of governmental licensing scheme that has consistently been declared invalid in this Court as a restraint on free expression. It authorizes an official to hold up mail while he makes a necessarily imprecise judgment as to whether it is "communist political propaganda" and, if he determines that it is, to await the response of the addressee to his inquiry as to whether delivery is desired. Second, the statute interferes with First Amendment rights by conditioning the release of mail upon the addressee's expression of a "desire" to receive it. Such a condition raises the distinct possibility that literature will not be delivered, either because the addressee may not go to the trouble of requesting it or because he feels an inevitable inhibition about advising the Government that he desires "communist political propaganda."

B. In a series of cases the Court has afforded constitutional protection to those seeking to maintain anonymity in the face of threatened disclosure of identity that would impair rights protected by the Bill of Rights. In this case it is plain that the listing procedure established under the statute is invalid because it exposes persons listed to governmental and private reprisals. The list has the attributes of a "blacklist", and indeed information about individuals on it has been turned over to congressional investigating committees. The fact of desiring communist propaganda also might be considered evidence of Communist Party or communist-front membership under the Internal Security Act of 1950, and, because of the substantial possibility of publicity, opens the door to widespread

opprobrium for those listed. In view of these facts, the court below turned its back on reality in finding that classification as a person listed "need not connote disapprobation." The court below also erred in its conclusion, based largely on an affidavit of the Postmaster General, that disclosure of the persons listed was unlikely. The affidavit itself is equivocal, and there is no assurance at all from customs officials, who administer the program and were responsible for past disclosures. The procedure under the statute is not materially different from the earlier administrative program under which disclosures took place. And even if there were only a small chance of disclosure, there would be a substantial inhibiting effect on free expression because large numbers of persons—not merely the timid—will refrain from taking a step which in any way identifies them as desiring communist propaganda.

C. Under the correct constitutional standard, which places First Amendment rights beyond abridgment, there is no possible justification for the statute. Nor is there any "paramount interest" present which might justify the dual restraints on free-expression created by Section 4008. Even if the Court evaluates the statute under the more elastic "balancing test," the result must be the same because no proper state interest has been shown that would remotely suffice to justify the severe encroachment on protected liberties. The real purpose of the statute was to discourage the dissemination of political ideas, a wholly impermissible goal that may play no role even in the broadest of balancing tests.

D. It is now beyond dispute that the Congress may not employ means more drastic than necessary to achieve its purposes when the result is impairment of free expression. Even assuming that Section 4008 had some proper legislative end involving the protection of Americans from an influx of "communist political propaganda," it is plain that less drastic alternatives are available, such as the

bill proposed by the late Congressman Walter, that would achieve this end without the vast encroachments sanctioned by the statute.

## II.

The term "communist political propaganda," as defined by reference to Section 1(j) of the Foreign Agents Registration Act of 1938, is an unconstitutionally vague standard by which officials are required to determine whether incoming literature is to be withheld from the addressee. The Registration Act defines political propaganda as any communication adapted to or intended to influence the public (i) with reference to the political or public interests, policies or relations of a government of a foreign country or a foreign political party, or (ii) with reference to the foreign policies of the United States, or (iii) which promotes in the United States racial, religious or social dissension, or (iv) which advocates, advises, instigates or promotes any racial, social, political or religious disorder, civil riot or other conflict involving the use of force or violence in any other American republic.

All four of these clauses are impermissibly vague under the governing criteria repeatedly laid down by this Court. None of them affords adequate guidelines to those entrusted with the administration of the program, particularly in view of the danger to First Amendment liberties presented by potentially free-wheeling interpretations. There is no limit to utterances, in these days of social ferment, that may promote "racial, religious or social" dissension or disorder within the meaning of clauses (iii) and (iv). And even if the vagueness of these clauses is cured by a generous reading of the condition in clause (iv) that the propaganda must advocate "the use of force or violence," no such curative possibility exists for clauses (i) and (ii). Under their expansive criteria officials are free to indulge in the broadest interpretations of "communist political propaganda," thus realizing the fears for freedom of ex-

pression that led the Kennedy Administration to oppose enactment of the statute.

### III.

Even if the statute is found not to infringe upon protected First Amendment rights by authorizing the detention of mail and listing persons expressing a "desire" to receive "communist political propaganda", the statute violates the due process clause of the Fifth Amendment in sanctioning these administrative determinations abridging basic rights without providing notice, hearing, and right of appeal on the question whether seized literature is in fact "communist political propaganda." It is well established that "the procedures by which the facts of the case are adjudicated are of special importance" when the government curtails free expression. *Speiser v. Randall*, 357 U. S. 513, 521. In the instant case, despite the substantial impairments of free expression, there is no mechanism whereby the addressee of detained mail is permitted to litigate, with proper procedural safeguards, the underlying factual questions involved. The decision below thus is in conflict with *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, which ruled that the Attorney General was barred by the Fifth Amendment from preparing lists, similar to those in the present case, without proper procedural safeguards.

### IV.

There is no justification for the invidious discrimination contained in the statute between those addressees, such as government agencies, universities and other institutions, that are permitted unrestricted access to mail, and all other persons, including writers, editors and the ordinary citizen, who are required to express a "desire" to receive mail that is found to be "communist political propaganda." Because this discrimination unjustifiably subordinates the citizen's legitimate quest for information to institutional recipients,

it is in violation of the due process clause of the Fifth Amendment, which prohibits the federal government from making arbitrary classifications. The only possible reason for the classifications contained in Section 4008 is that "communist political propaganda" is too dangerous for the average American to handle, but this reason cannot suffice because it is fundamentally inconsistent with the constitutional purpose to protect expression of every variety without regard to its popularity or social utility.

## V.

The statute violates both the Fourth and Fifth Amendments because it sanctions an unreasonable search and seizure and requires the would-be reader to incriminate himself. As in *Boyd v. United States*, 116 U. S. 616, where the Court recognized the "intimate relation between the two amendments," the addressee is improperly put to a Hobson's choice. He is forced by the statute to choose between possible incrimination under the listing procedure and the alternative of forever foregoing the opportunity to receive mail addressed to him. Nor can the search be justified by its nature and purpose. Only in cases involving the use of the mails for criminal purposes—a possibility wholly absent here—have detentions of mail been countenanced. The right of privacy protected by the Fourth Amendment should be protected with particular care because the search under the statute is unlimited in scope and directed at the political content of the mail.

## VI.

Contrary to the decision below, the present action is neither moot nor unripe for adjudication, and appellant has standing to raise the constitutional questions presented both in his own right and as representative of third parties.

A. Appellant's claim challenging the detention of mail by the Postmaster General is not moot because, although he

is now listed as entitled to receive literature addressed to him, his mail is subject to considerable interference and delay which is not capable of being cured under the procedures established under the statute.

B. Appellant's claim challenging the listing procedure is not premature because there is no solid basis for the conclusion that the lists containing his name will be kept out of the hands of officials or members of the public who would take action against or stigmatize him. There is nothing hypothetical about the danger that the lists will be delivered to government agencies or disseminated publicly in view of the past practices of those maintaining lists, the equivocal affidavit filed by the Postmaster General, and the political realities of the listing process. The court below misconstrued the ripeness doctrine, failing to recognize its lack of rigidity and the application of the rule which calls for adjudication on the merits in cases where, as here, there is substantial likelihood of harm to the person raising constitutional issues.

C. Appellant has standing to represent third parties in challenging both the detention of mail and the listing procedure. He is the "only effective adversary" in a case against the Postmaster General, *Barrows v. Jackson*, 346 U. S. 249, 255-59, and in view of the plain abridgement of his First Amendment rights in two distinct ways, he is "an appropriate representative" of a class of persons loath to assert their rights openly because of the harm that would follow loss of anonymity. *NAACP v. Alabama*, 357 U. S. 499.

The instant case presents the strongest possible occasion for adjudication on the merits because fundamental constitutional liberties are involved that will, if appellant is denied standing, be permanently immunized from judicial review by the Government's deliberate and ingenious practice of treating the filing of a lawsuit challenging the statute as tantamount to a request for immediate delivery of communist political propaganda.

## ARGUMENT

### POINT I

#### **The statute impairs freedom of expression.**

The broad right to distribute literature, protected by the First Amendment, has been affirmed in this Court on many occasions. In *Martin v. Struthers*, 319 U. S. 141, which declared invalid an ordinance prohibiting door-to-door distribution of handbills, the Court stated at 143:

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, *Lovell v. Griffin*, 303 U. S. 444, 452, and necessarily protects the right to receive it. \* \* \*

The right to receive information is included in the scope of the protection because the receipt of information furthers the primary policies embedded in the Amendment, those described by Professor Thomas I. Emerson as the public's attainment of truth and widespread participation in decision-making. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 881-884. That the rights have generally been vindicated by the efforts of distributors does not detract from the fact that an essential concern of the Amendment is for the recipient.

The importance of the First Amendment in our society and its preferred constitutional position have been reiterated again and again in decisions of the Court. Mr. Justice Stewart described the protected rights as being "at the foundation of a government based upon the consent of an informed citizenry \* \* \*." *Bates v. Little Rock*; 361 U. S.

516, 522-523. And in a classic statement, the Court in *Thornhill v. Alabama*, 310 U. S. 88, 101-02, carefully explained the reasons for the preferred status of the First Amendment:

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. \* \* \* Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

That the material in question may be described as "communist political propaganda" does not derogate from the individual's right to receive it, for "the Constitution protects expression and association without regard \* \* \* to the truth, popularity or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U. S. 415, 444-45. There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U. S. 254, 270.

The mails are of course subject to the control of Congress, under Article I, section 8 of the Constitution, and some of the earlier cases either held or suggested that this congressional power was not limited by the First Amendment. That view is no longer tenable. Thus, " \* \* \* Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if

directly attempted would be unconstitutional.'" *Speiser v. Randall*, 357 U. S. 513, 518. See also *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 155-156. The theory of the absolute and unfettered power over the mails was expressly rejected in Mr. Justice Harlan's separate opinion in *Roth v. United States*, 354 U. S. 476, 504n:

The hoary dogma of *Ex parte Jackson*, 96 U. S. 727, and *Public Clearing House v. Coyne*, 194 U. S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting, in *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 430-433; Holmes, J., dissenting, in *Leach v. Carlile*, 258 U. S. 138, 140; *Cates v. Haberline*, 342 U. S. 804, reversing 189 F. 2d 369; *Door v. Donaldson*, 90 U. S. App. D. C. 188, 195 F. 8d 764.

**A. The statute is invalid because in effect it establishes an unconstitutional licensing system that abridges the free delivery of the mails.**

It is well established that registration and licensing as conditions for the distribution of literature are invalid under the First Amendment. In *Lovell v. Griffin*, 303 U. S. 444, in striking down a municipal ordinance forbidding the distribution of literature without first obtaining written permission from the City Manager, the Court said at page 451:

Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' (Emphasis in original.)

See also *Schneider v. State*, 308 U. S. 147; *Jamison v. Texas*, 318 U. S. 413. The broad principle reflected by these cases, that governmental licensing is wholly inconsistent with the First Amendment, has been applied to similar restraints on a person scheduled to make a speech, *Thomas v. Collins*, 323 U. S. 516, and to a 2% license tax on newspaper advertising revenue, *Grosjean v. American Press Co.*, 297 U. S. 233.

The statute here establishes the kind of governmental registration and licensing scheme that has consistently been declared invalid by this Court. Pursuant to the statute, an official in the bureaucracy seizes incoming literature, makes a determination as to whether it falls within the vague standard of "communist political propaganda", then writes the addressee inquiring whether the mail is desired, and delivers it only upon such an expression of desire.

The restraints on freedom of speech are plain. First, there is the inevitable delay while a Government official inspects the mail, makes a necessarily imprecise judgment about it, writes the addressees, and then awaits a response before dispatching it. The hand of officialdom is present at every step. Just as the licensing authority in the *Lovell*, *Schneider* and *Jamison* cases controlled the flow of ideas to the public, so here the Government regulates the transmittal of mail to addressees throughout the United States.

A second and more serious obstacle that the statute poses to the exercise of First Amendment rights arises out of the fact that unless the addressee of literature expresses a "desire" to receive it, the mail is never delivered. Quite apart from the consequences of listing individuals who express such a "desire" to receive "communist political propaganda" (which will be treated in Section B below), there is an obvious restraint on the free flow of mail by so conditioning its release. There is a substantial possibility

that the mail will not be delivered. First, the addressee must go to the trouble of requesting the mail—an affirmative obligation which the Government may not constitutionally impose upon the citizen. In addition, the addressee is bound to feel some inhibition about dealing with the Government on an issue as sensitive as the receipt of alleged “communist political propaganda.” If a man must be a martyr, or thinks that he may be one, before being allowed by the Government to read what is sent to him through the mails, the people surely do not enjoy the “uninhibited, robust, and wide-open” debate contemplated by the First Amendment. *New York Times v. Sullivan*, 376 U. S. 254, 270.

**B. The statute is invalid because the listing procedure established under it impairs protected rights of anonymity by exposing those listed to governmental and private reprisals.**

In a series of cases over the past decade the Court has afforded constitutional protection to those seeking to maintain anonymity in the face of threatened disclosure of identity that would impair rights protected by the Bill of Rights. It is difficult to imagine a case in which the loss of anonymity is more likely to lead to injury than the present one and where that injury is more directly related to the exercise of liberties safeguarded by the First Amendment.

In *NAACP v. Alabama*, 357 U. S. 449, and *Bates v. Little Rock*, 361 U. S. 516, the Court protected the important interest underlying anonymity by refusing to countenance the enforced disclosure of membership lists where it appeared likely that injury would flow from the loss of anonymity. And in *Talley v. California*, 362 U. S. 60, the Court invalidated an ordinance requiring that handbills show the name of the distributor, saying at page 64, “There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information

and thereby freedom of expression." See Note, *The Constitutional Right to Anonymity*, 70 Yale L. J. 1084.<sup>5</sup>

The instant case falls squarely within the principle underlying these decisions and is indeed a much stronger occasion for its application. In the first place, as the statutory court said in *Heilberg*: "If identification of a distributor is constitutionally impermissible, *a fortiori*, identification of a recipient, whose rights are similarly protected [See *Martin v. Struthers*, 319 U. S. 141 (1943)], would no less 'tend to restrict \* \* \* freedom of expresion' " Second, there is far more justification for the fear of loss of anonymity here than in *Talley*, where there was little objective showing of harm that was likely to follow from enforced disclosure of identity.

The primary danger inherent in maintaining lists under Section 4008 becomes plain in the light of the history of the screening process before the enactment of the statute. During that period of enforcement, information about individuals that was obtained by executive agencies was routinely turned over to congressional committees, which on several occasions used it in interrogating witnesses. The authors of the most comprehensive study of the program, observing this pattern, commented on the "close

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<sup>5</sup> "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority. It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties." *Sweezy v. New Hampshire*, 354 U. S. 234, 266 (Frankfurter, J. concurring).

liaison between the Un-American Activities Committee and enforcement officials." Schwartz and Paul, 631.<sup>6</sup>

But the potential injury to those seeking to receive what an official considers "communist political propaganda" is not limited to the excesses of congressional committees. The lists established pursuant to the statute have many of the "blacklist" attributes of the Attorney-General's list of subversive organization, see *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, and like it can be used to probe the reading habits of Americans under investigation by loyalty and security boards concerned with employees of the government, government contractors, and international organizations. See Report of the Special Committee on the Federal Loyalty Security Program of the Association of the Bar of the City of New York (1956). The fact of desiring communist propaganda also might be considered evidence of Communist Party membership or of Communist Front membership under the Internal Security Act of 1950; for example, in proceedings before the Subversive Activities Control Board, literature regarded as communist propaganda has furnished a con-

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<sup>6</sup> Frank acknowledgment of disclosure of the recipients of "communist propaganda" is found in the transcripts of many congressional hearings. For example: *Investigation of Communist Propaganda in the United States—Part I*, Hearings, House Committee on Un-American Activities, 84th Cong., 2d Sess., June 13, 1956, p. 4714; *Communist Infiltration & Activities in the South*, Hearings, House Committee on Un-American Activities, 85th Cong., 2d Sess., July 29, 30 and 31, 1958, p. 2641; *Communist Propaganda—Part 9 (Student Groups, Distributors & Propaganda)*, Hearings, House Committee on Un-American Activities, 85th Cong., 2d Sess., June 11 and 12, 1958, p. 2433; *Communist Infiltration and Activities in Newark, N. J.*, Hearings, House Committee on Un-American Activities, 85th Cong., 2d Sess., Sept. 3, 4 and 5, 1958, p. 2794; *Communist Political Propaganda and Use of United States Mails, Part 2*, Hearings, Subcommittee to Investigate the Administration of the Internal Security Act, etc., of the Senate Committee of the Judiciary, 87th Cong., 1st Sess., p. 56.

siderable part of the evidence against the respondent organizations.<sup>7</sup>

Not only does the maintenance of such lists open the door to official sanctions, but the possibility of their becoming public, whether by congressional committees as in the past or otherwise, makes public opprobrium likely. For this reason opponents of the legislation in the Senate were properly concerned about the stigma that would attach to persons requesting such literature. See Sen. Rep. 2120, 87th Cong. 2d Sess., p. 44 (individual views of Senator Clark).<sup>8</sup> As Judge Feinberg, dissenting, stated below (R. 32):

\* \* \* [W]hether classification as a person desiring to receive communist political propaganda need connote public disapprobation is irrelevant, since it ordinarily does so connote, and social ostracism flows from this. Cf. *Grant v. Reader's Digest Ass'n*, 151 F. 2d 733, 735 (2 Cir.), cert. denied, 326 U. S. 797 (1946). (Emphasis in original.)

In view of this recent history, the court below turned its back on the realities of contemporary life in finding that "classification as a person desiring to receive communist political propaganda \* \* \* need not connote disapprobation." In reaching this surprising conclusion the

<sup>7</sup> See, e.g., *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1; *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board*, 331 F. 2d 64, certiorari granted, 377 U. S. 989; *American Committee for the Protection of the Foreign Born v. Subversive Activities Control Board*, 331 F. 2d 53, certiorari granted, 377 U. S. 915.

<sup>8</sup> Senator Clark said on the floor of Congress: "Those who ask to have such Communist propaganda delivered to them will have it delivered to them, but their names will be placed on a list. My guess is that that would not be particularly good for their reputation in the climate of opinion prevailing in certain areas of our country." 108 Cong. Rec. 20843. Senator Yarborough pointed out that even the addressees who did not request this literature might be adversely affected. 108 Cong. Rec. 20845.

court relied on the statutory exemptions for "reputable organizations and individuals [who] may receive communist political propaganda without any disgrace attaching." (R. 25).

But the statutory exemptions suggest precisely the opposite conclusion: anyone who is not within any of the exempt (*i. e.*, reputable) classes has no proper reason to read propaganda and is therefore suspect. Recognizing these facts, the *Heilberg* court found that "the social stigma and economic injury they may suffer is very real." Or, as Mr. Justice Douglas said in his concurring opinion in *United States v. Rumely*, 345 U. S. 41, 58: "If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in libraries, bookstores and homes of the land."

The Postmaster General attempted to counteract the above facts by filing an affidavit submitted in response to allegations in paragraph 8 of appellant's complaint that information on the lists maintained under the screening program has been or is likely to be made public (R. 2). The affidavit states in pertinent part (R. 16):

"2. One of the points covered in the establishment of each Propaganda Unit was an instruction that the file kept on addressees to whom propaganda had been sent would not be made public and that no part of this file could be released to any person, U. S. government agency or other group, except with express permission from Post Office Department headquarters in Washington.

The court below interpreted the affidavit as evidencing "a solicitous regard for the confidentiality of this information", and felt that "the change in administration and the material differences between the two programs [pre-statutory and statutory]" (R. 26) was sufficient to dispose of the claim that disclosure was likely to continue.

But this conclusion is without basis in fact. In the first place; it is an erroneous reading of the affidavit, which at best is equivocal and thereby suggests strongly that past practices will continue—as would any response but a categorical undertaking to maintain the lists in complete secrecy. Second, there is no material difference between the two programs. They are essentially identical, and however policies of the executive branch may have changed with the advent of a new administration in 1961, the powers and policies of the congressional committees continue as before.

Furthermore, the conclusion of the Court below is dubious as a practical estimate of the consequences of listing because, even if a good faith effort were made to keep the lists confidential, the risk of disclosure would be great. Not only is there no assurance from customs officials, who administer the program and who were responsible for past disclosures, but the lists are permanent, while administrations and policies change. As the court in *Heilberg* stated:

Assurances by defendant that these practices have been discontinued cannot be reasonably expected to mitigate a person's reluctance to have his name associated with 'communist political propaganda.' There are no similar assurances that this information will not be made available in the future in view of the lack of statutory requirement that information received pursuant to Section 4008 remains confidential.

But even if the risk of disclosure were less than it patently is, the deterrent effects of listing all those who express a desire to receive "communist political propaganda" are bound to be severe. The ordinary citizen does not know whether such lists have ever been made public in the past or may be in the future. Nor can he know whether the Government will use the lists to prejudice him. Certainly the notice sent to addressees (R. 13) contains no assurance of

anonymity. In our contemporary political society, where loyalty and security programs affect millions of governmental and non-governmental employees, it can safely be assumed that large numbers of persons—not merely the timid—will refrain from taking a step which in any way identifies them as having an interest in “communist political propaganda.”

**C. There is no justification for the significant infringement of freedom of expression by the statute.**

Under the appropriate constitutional standard “First Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation or exposure by government.” *Bates v. Little Rock*, 361 U. S. 516, 528 (Justices Black and Douglas, concurring). Or as the Court recently stated, “It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,’ *Thomas v. Collins*, 323 U. S. 516, 530.” *Sherbert v. Verner*, 374 U. S. 398, 406. See also *Barenblatt v. United States*, 360 U. S. 109, 134 (Justice Black, dissenting); *Konigsberg v. State Bar of California*, 366 U. S. 36, 56 (Justice Black, dissenting).

Under this standard Section 4008 is clearly invalid under the First Amendment. It imposes a direct restraint on free expression, both as a licensing mechanism and through enforced disclosure of all those desiring “communist political propaganda.” And there are hardly the kind of “paramount interests” present that would justify any limitation of these principles.<sup>9</sup> Accordingly, under the

<sup>9</sup> Adequate statutory authority already exists for coping with any true emergency. 18 U. S. C. 1717 provides criminal sanctions for the mailing of matter which is treasonous or insurrectionary, and 19 U. S. C. 1305(a) prevents its importation from abroad.

appropriate constitutional standard, the decision below should be reversed.

Even if the Court evaluates the constitutionality of Section 4008 according to a more permissive standard, whether by a "balancing test" or similar criterion, the result should be the same because no state interest has been shown that would remotely suffice to support the encroachment of First Amendment rights under Section 4008.

Various justifications have been offered at times, including the saving of the taxpayer's money, the benefit to American foreign policy, and the protection of persons from receipt of Communist propaganda. But no facts have been offered that tend to support these contentions. As the *Heilberg* court concluded "[the Government's] interests, while 'compelling' in theory, are insubstantial, illusory in fact and ignore available alternatives."<sup>10</sup>

Indeed, a reading of the legislative history makes it abundantly clear that the sole purpose of the statute was to discourage the dissemination of matter which Congress felt to be politically offensive. Representative Cunningham's original proposal was to prohibit flatly the mailing of all Communist propaganda, and the statute as finally enacted is popularly known as the Cunningham Amendment. That the sole purpose of Section 4008 was to discourage the dissemination of political opinion is made evident from Mr. Cunningham's remarks upon its passage:

Like the House version I want to say that this amendment in the conference report is a very strong and worthwhile amendment to stop the free delivery of Communist propaganda in the United States postal system. In my opinion it will stop at least 95 percent of Communist political propaganda from being delivered in the United States. It is going to

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<sup>10</sup> In fact, the program may be positively harmful. At least this seems the thrust of President Kennedy's statement of March 17, 1961. See note 2, *supra*.

be easily administered; it is going to stop this vicious material from coming into this country and being delivered free. *Section 305 of the conference report accomplishes the same thing as would Section 12 in the House-passed version.* (108 Cong. Rec. 22601 (1962)) (emphasis added)

And in the Senate debate, Senator Johnston, the committee chairman, described the bill as one "to blot out the delivery of communist political propaganda through the U. S. mails" (108 Cong. Rec. 20986).

However compelling the legislators found this purpose to be, it is precisely what the First Amendment prohibits, and it may play no role even under the broadest of balancing tests. The Constitution has no favorites in the world of thought. See *NAACP v. Button*, *supra*.

In sum, even under the so-called "balancing" test that permits incursion on freedom of communication, there is no valid justification for the severe encroachments that occur pursuant to Section 4008.

**D. The statute is invalid because it stifles freedom of expression more broadly than necessary in the light of available alternative means of achieving the legislative purpose.**

It is now beyond dispute that the Congress may not employ means more drastic than necessary to achieve its purposes when the result is broad impairment of free expression. As the Court said in *Shelton v. Tucker*, 364 U. S. 479, 488:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

The principle of the *Shelton* case was recently applied in *Aptheker v. Rusk*, 378 U. S. 500, where the Court invalidated

"broad travel restrictions on members of the Communist Party imposed by Section 5 of the Subversive Activities Control Act. Noting that "Congress [had] within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security," 378 U. S. at 512-13, the Court went on to say at 514:

The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil', cf. *Canwell v. Connecticut*, 310 U. S. at 307, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, *NAACP v. Button*, 371 U. S. at 438.

See also Freund, *Competing Freedoms in American Constitutional Law*, 13 U. of Chicago Conference Series 26, 32-33; Richardson, *Freedom of Expression and the Function of Courts*, 65 Harv. L. Rev. 1, 6, 23-24.<sup>11</sup>

Even assuming some proper legislative end that involves protecting Americans from an influx of "communist political propaganda," it is plain that "less drastic" alternatives are available that would achieve this goal without the vast encroachment on freedom of expression sanctioned by Section 4008.

The simplest alternative is embodied in the recommendation of the late Congressman Walter, who introduced H. R. 5751, 87th Cong. 1st Sess. (reported out with H. Rep. 309, 87th Cong. 1st Sess.). Mr. Walter, who was not noted for his friendly attitude towards communism, was satisfied with a bill which, as reported out, merely would have authorized the Postmaster either to place notices in post offices informing the public or notify recipients directly that communist propaganda in quantity was being sent through the mails. The bill provided that in cases where

<sup>11</sup> Even in the constitutionally less sensitive area of regulation of interstate commerce, the Court has scanned statutory restraints with a weather eye and has invalidated oppressive local regulation where "reasonable and adequate alternatives are available." *Dean Milk v. Madison*, 340 U. S. 349, 354.

recipients decided on their own initiative that such propaganda was unwanted, it could be returned to the post office free of charge. If Congress believes that a problem warranting legislative action exists, it is obvious that the Walter proposal is a far more careful and less dangerous means of achieving that goal than Section 4008. Indeed the existing post office regulations already contain an effective remedy. 39 C. F. R. 44.1(a) provides that any person may authorize the postmaster to withhold the delivery of specifically described classes of foreign printed matter and to substitute his judgment as to classification for that of the addressee.

Undoubtedly there are other ways that Congress could, if it wishes, deal with "communist political propaganda." The one clear fact is that the method chosen is impermissible because it, "broadly stifle[s] fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U. S. 479, 488.

## POINT II

**The statute is void because the term "communist political propaganda" is unconstitutionally vague and there are no adequate standards to guide those charged with its administration.**

The term "communist political propaganda" in Section 4008 means political propaganda as defined in Section 1(j) of the Foreign Agents Registration Act of 1938, as amended, 22 U. S. C. 611(j), issued by or on behalf of certain countries, particularly those in the Communist bloc.<sup>12</sup>

<sup>12</sup> That is, those "with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended."

Section 1(j) of the Foreign Agents Registration Act defines political propaganda as any communications adapted to or intended to influence the public

(i) "with reference to the political or public interests, policies or relations of a government of a foreign country or a foreign political party"

or

(ii) "with reference to the foreign policies of the United States"

or

(iii) "to promote in the United States racial, religious or social dissensions" [sic]

or

(iv) "which advocates, advises, instigates or promotes any racial, social, political or religious disorder, civil riot or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by means involving the use of force or violence \* \* \*."

Under the governing criteria repeatedly laid down by this Court, Section 4008 is invalid as impermissibly vague. The statute demonstrably falls within the class of cases which have held that a statute violates due process when it is in "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application \* \* \*." *Connally v. General Construction Co.*, 269 U. S. 385, 391. See also *Lanzetta v. New Jersey*, 306 U. S. 451, 453; *United States v. Cardiff*, 344 U. S. 174, 176.

The present statute is one of those where the "vice of unconstitutional vagueness is further aggravated [because it] operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Bd. of Public Instruction*, 368 U. S. 278, 287. See also *Baggett v. Bullitt*, 377 U. S. 360; *Smith v. California*, 361 U. S. 147, 151; *Stromberg v. California*, 283 U. S. 359, 369.

The above decisions involved statutes where the individual was "required at peril of life, liberty or property

to speculate as to the meaning of penal statutes," *Lanzetta v. New Jersey, supra*, or to guess at the meaning of vague oaths required of employees "at the risk of subsequent prosecution for perjury, or . . . immediate dismissal from public service." *Cramp v. Bd. of Public Education*, 368 U. S. at 285.

In the present case it is a government official who must reckon with the vague words of Section 4008. Accordingly, the statute here is invalid under the rulings of this Court that prohibit an overbroad and imprecise delegation of legislative power to officials of the executive branch. Section 9(c) of Title I of the National Industrial Recovery Act, which authorized the President "to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof," was struck down because it provided no precise guidelines. *Panama Refining Co. v. Ryan*, 293 U. S. 388. And Section 3 of the NIRA was likewise invalidated because it gave the President unbounded discretion to approve binding "Codes of Fair Competition" in certain industries without clarifying just what "Fair Competition" was or how it was to be determined. *Schechter Poultry Corp. v. United States*, 295 U. S. 495.

The loose standards set out in Section 1(j) of the Foreign Agents Registration Act, which defines "communist political propaganda," are equally inadequate as criteria for official action. Indeed, they are more clearly invalid than the statutes in either the *Panama Refining* or *Schechter Poultry* cases because the latter presented no threat to the preferred freedoms guaranteed by the First Amendment. In the instant case, the danger to First Amendment liberties is intense because a member of the bureaucracy is given the authority to determine, on the basis of his view of the fluid terms of Section 1(j), whether mail will be delivered to the person to whom it is addressed. In such circumstances, the protections afforded by the doctrine prohibiting vague delegations to the executive branch are or should be

correspondingly greater, just as the doctrine which prohibits imprecise penal statutes has been applied with special vigor on occasions in which fundamental freedoms are jeopardized. See e.g., *Winters v. New York*, 333 U. S. 507; *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Cramp v. Bd. of Public Instruction*, *supra*; *Baggett v. Bullitt*, *supra*; see generally Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. 67.

The four clauses of Section 1(j) noted above are impermissibly vague. Taking the clauses we have numbered (iii) and (iv) first, what are the bounds, in these days of social ferment, of propaganda that promotes "racial, religious or social" dissension or disorder? Virtually every statement on a public issue has the tendency to arouse one group or another that may feel its interests are threatened. Any comment about conflicts between Greeks and Turks, Arabs and Jews, unions and management, tends to, and indeed has, stimulated "dissension" or "disorder." It would be difficult to imagine terms more expansive in meaning or so prone to over-generous application.

It might be said that clause (iv) above, and perhaps even clause (iii) are qualified by the condition in clause (iv) that the propaganda advocates "the use of force or violence in any other American republic or the overthrow of any government . . . ." Such a reading, particularly with respect to clause (iii), seems unjustified by the plain language of the statute. Moreover, even these terms of condition are hardly precise, and it is difficult to understand how a vague condition can cure the vice of an even vaguer statutory definition.

But assuming that clauses (iv) and (iii) are made sufficiently precise by a strained reading, it seems inconceivable that clauses (i) and (ii) are valid as providing adequate guidelines to officials entrusted with the statutory responsi-

bility of screening and holding up mail addressed to persons within the United States.

What exactly does it mean to influence the public "with reference to the political or public interests, policies or relations" of a foreign government or foreign political party? And what could be a more fluid concept than influencing the public "with reference to the foreign policies of the United States?" There would seem to be little or nothing that is published by anyone that does not arguably fall within these categories, and yet they are the criteria by which officials are to decide what persons in the United States are to be permitted to read without restraint.

Recognizing these infirmities, the Kennedy Administration opposed the Cunningham Amendment on the ground that the definition of "communist political propaganda" was overly vague. President Kennedy wrote that the bill "does not give the Attorney General very clear guidance as to what he is supposed to label communist and political propaganda," and he suggested that the Senate "should examine the language very clearly and make sure that it is effective and is responsive to our national needs, and determine whether the generalized instructions to the Attorney General fall within the necessity of legal precision."<sup>13</sup>

That the statute is unduly vague is clear not only from its language and legislative history, but also from the evidence available concerning administrative enforcement of the foreign censorship program which antedated Section

<sup>13</sup> 108 Cong. Rec. 20845, 20846. The Attorney General also was of the opinion that the definition in the Foreign Agents Registration Act was too vague for use in such a statute. Hearings before the Senate Committee on Post Office and Civil Service on H.R. 7927, 87th Cong., 1st Sess., p. 830. The Treasury Department agreed.

Senators opposed to the bill likewise noted its vagueness. See Senator Clark's individual views in Sen. Rep. 2120, pp. 42-43 and in 108 Cong. Rec. 20843, 20844.

4008. As the two leading commentators on the subject have noted:

The criteria for propaganda are so broad that enforcement officials in the field were able to find suspect matter in Soviet published works on art, religion, philosophy, 19th Century literature and even so apolitical a subject as 'Chess for Beginners'. Schwartz and Paul, 633, quoted in 108 Cong. Rec. 20640.

Accordingly, the term "communist political propaganda" is in violation of the due process clause of the Fifth Amendment because it provides no valid standards to guide the administrative officials charged with its enforcement.

### POINT III

**The statute denies appellant procedural due process because it authorizes administrative determinations abridging basic rights without notice, hearing or right of appeal.**

We have already demonstrated that Section 4008 impermissibly infringes upon freedom of speech by authorizing the detention of mail and the maintenance of official lists of persons who have expressed a "desire" to receive "communist political propaganda." Even if the statute is found not to be inconsistent with the protections afforded by the First Amendment, it is violative of the due process clause of the Fifth Amendment because it sanctions these administrative determinations abridging basic rights without providing notice, hearing, and right of appeal on the question whether seized literature is in fact "communist political propaganda."

It is well established that "in the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau v. McDowell*, 256 U. S. 465, 477

(Justice Brandeis dissenting). Accordingly, notice and hearing are prerequisite to due process not only in criminal actions, e.g., *In re Oliver*, 333 U. S. 257, 273, but also in civil proceedings. E.g., *Coe v. Armour Fertilizer Works*, 237 U. S. 413; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292.

These protections are, of course, of special importance when constitutional liberties are threatened. Thus, in *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66, the Court said: "[T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." See also, *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205; *Marcus v. Search Warrant*, 367 U. S. 717.

Surely if procedural safeguards are required in cases involving allegedly obscene literature, which may turn out to be speech unprotected by the First Amendment, see *Roth v. United States*, 354 U. S. 476, such protections are all the more called for where, as here, there is no doubt that First Amendment rights are infringed by the establishment of lists that impede the uninhibited exchange of ideas.

That Section 4008 is invalid under the due process clause for failing to provide even minimal protection to those who wish to exercise their constitutional right to receive mail addressed to them is seen even more plainly in the light of *Speiser v. Randall*, 357 U. S. 513, 521, where the Court stated:

[S]ince only considerations of the greatest urgency can justify restrictions on speech . . . the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.

Under Section 4008, however, there are *no* safeguards afforded to those who are placed on the Postmaster General's list and there is *no* procedure by which the facts of the case—i.e., whether mail is in fact communist political propaganda—are adjudicated. In the absence of such procedures, the statute is plainly in violation of the due process clause of the Fifth Amendment.

The decision in *Joint Anti-Fascist Refugee Committee v. McGrath*; 341 U. S. 123, should control the instant case. There the Attorney General, without notice or hearing, designated three organizations as Communist in a list used in connection with determinations of disloyalty of government employees and disseminated to all departments of the Government. A majority of the Court agreed that whatever the constitutional authority of the Attorney General to prepare lists of Communist organizations, he could not act without proper procedural safeguards. As stated in the concurring opinion of Mr. Justice Black (341 U. S. at 143), " \* \* \* I agree with Mr. Justice Frankfurter that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing." See also 341 U. S. at 137-38 (opinion of Mr. Justice Burton); 341 U. S. at 178-81 (opinion of Mr. Justice Douglas).

The parallel to the *Joint Anti-Fascist* decision is clear. The lists maintained under Section 4008 are of individuals who "desire" to receive "communist political propaganda." As pointed out above, these lists have been circulated in the past among congressional committees and executive agencies with the power and often the intention to use the information in individual loyalty and security cases. Just as the Attorney General was held to lack power to compile such lists without proper procedural safeguards, so the Postmaster General is required under the Constitution to provide notice, hearing, and an appeal on the question whether the mail involved is in fact "communist political propaganda."

## POINT IV

**The classifications of those entitled to an exemption under Section 4008 are arbitrary and thereby deny appellant due process.**

*Bolling v. Sharpe*, 347 U. S. 497, 499, recognized that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive" and ruled that under the Fifth Amendment "discrimination may be so unjustifiable as to be violative of due process." The classifications established by Section 4008, which determine the categories of readers who are exempt from the screening and listing provisions, are so arbitrary and unjustifiable that they deprive appellant and other members of the public of due process of law.

Section 4008 provides for unrestricted access to all literature from abroad for "any United States government agency, or any public library, or \* \* \* any college, university, graduate school or scientific or professional institution for advanced studies, or any official thereof." On the other hand, all other persons, including publishers, writers, independent scholars, and just plain citizens with lively curiosity, are required to submit themselves to the statutory mechanism.

There is no possible justification for this discrimination. The citizen's right to be informed is as great and perhaps greater than that of impersonal institutions and libraries. This Court has recognized that the individual's "right to receive" literature is constitutionally protected, *Martin v. Struthers*, 319 U. S. 141, 143, and that rights safeguarded by the First Amendment are "at the foundation of a government based upon the consent of an informed citizenry." *Bates v. Little Rock*, 361 U. S. 516, 522-23. In short, the First Amendment is grounded, not upon the prerogative of a government agency to secure information or

the ability of a university to collect data, but upon the right of the individual citizen to have unrestricted access to information of every kind in order to exercise his public responsibilities.

Section 4008 flies in the face of this high constitutional policy. Not only does it interfere with the individual's legitimate quest for information, but it subordinates the citizen's right to receive literature as compared to governments, universities and other institutional recipients. The only possible reason for such a patent discrimination is that "communist political propaganda" is too hot for the average American to handle, and therefore should be kept out of his grasp as much as possible. But this is not a valid basis for discriminating either against the ordinary citizen or against writers, publishers, and editors, who all may have good reasons for reading material from all sources. The Constitution does not authorize the Government to protect the more timid or susceptible American citizens against material deemed harmful to them. Cf. *Butler v. Michigan*, 352 U. S. 380.

Just as the Court has determined that "all legal restrictions which curtail the civil rights of a racial group are immediately suspect," *Korematsu v. United States*, 323 U. S. 214, 216, so should be legal restrictions that directly impair freedoms guaranteed by the Bill of Rights. Under this test it is plain that Section 4008 arbitrarily discriminates against appellant and members of the public generally, and accordingly is in violation of the due process clause of the Fifth Amendment. Cf. *Skinner v. Oklahoma*, 316 U. S. 535; see generally Tussman and TenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341.

## POINT V

**The statute sanctions an unreasonable search and seizure prohibited by the Fourth Amendment and requires self-incrimination contrary to the Fifth Amendment.**

Section 4008 is invalid under both the Fourth and Fifth Amendments to the Constitution. The leading case of *Boyd v. United States*, 116 U. S. 616, 633, noted "the intimate relation between the two amendments." It said:

They throw great light on each other. For the "unreasonable searches and seizures" condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the fifth amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the fourth amendment.

In the *Boyd* case the Court invalidated a judicial order entered pursuant to statute whereby Boyd was required to produce his private books and papers or else suffer the entry of judgment against him in an *in rem* action involving certain seized property. In other words, the Court refused to countenance under the Fourth and Fifth Amendments a procedure putting Boyd to a Hobson's choice in which he either had to disclose his private affairs or else lose the opportunity to establish a valid claim to property that was the subject of a pending action.

The present case presents a set of facts remarkably similar in pertinent respects to those in the *Boyd* case. Here too addressees of the proscribed mail are forced to the unpalatable choice between possible incrimination by disclosing a "desire" to receive "communist political

propaganda" or else losing forever the opportunity to receive mail which is addressed to them and rightfully theirs. In fact, the procedure established under Section 4008 is even harsher than in *Boyd* because here the Postmaster General need not await any decision by addressees before obtaining and inspecting the alleged "communist political propaganda;" the statute itself makes provision for such seizure irrespective of the wishes of addressees. And the incriminating quality of the disclosure is likewise clearer here than in *Boyd*. In that case it was uncertain whether the papers involved would in fact have been incriminatory, but we know from experience that the names listed pursuant to Section 4008 have been used to the injury of individuals before congressional committees and in other respects.

Although an early decision held that a search of other than first class mail without a warrant does not constitute an unreasonable search and seizure, *Ex parte Jackson*, 96 U. S. 727, that case has no application here. For the permissibility of a search under the Fourth Amendment is to be determined by its nature and its purpose. In the *Jackson* case, the search that was found to be reasonable was specifically limited to finding evidence of a particular crime. Here, on the other hand, there is no suggestion that the mail itself is criminal in character. Instead, the search is unlimited in scope and is directed at the political content of the mail. It is difficult to imagine a purpose more at odds with the policies underlying the Fourth Amendment, the essence of which is the protection of privacy. As stated by Mr. Justice Brandeis in his classic dissent in *Olmstead v. United States*, 277 U. S. 438, 478:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material

things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, *every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.* (Emphasis added.)

In the *Jackson* case itself, the Court anticipated improper inspections of other than first class mail, such as the one in the instant case, and decisively rejected the possibility of its being valid. The Court said, 96 U. S. 727, 733:

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.

If the rights guaranteed by the Fourth Amendment "are to be regarded as of the very essence of constitutional liberty," *Gouled v. United States*, 255 U. S. 298, 304, the kind of officious inspection conducted at large pursuant to Section 4008 is plainly invalid.

## POINT VI

**The constitutional issues are appropriate for immediate adjudication in this action.**

The court below never reached the merits of the present controversy. It dismissed the action on the ground that the issues were moot or lacked ripeness and that the appellant lacked standing to raise the constitutional questions on his own behalf or as representative of third parties. This ruling misconceived the nature of the limitations on

the exercise of jurisdiction by this Court. The *Heilberg* case, which explicitly disagreed with the court below, reflects a correct understanding of the doctrines of mootness, ripeness and standing.

**A. Appellant's claim challenging the detention of mail by the Postmaster General is not moot.**

The court below regarded that portion of appellant's claim which challenged the Postmaster General's power to detain "communist political propaganda" as moot because "defendant has ordered the unimpeded delivery of plaintiff's mail" (R. 21). But this conclusion is incorrect because appellant continues to suffer impairment of his rights under the First Amendment.

There is not now and there cannot ever be in the future an "unimpeded delivery" of appellant's mail. The statutory screening process necessarily delays delivery not only of mail found to contain "propaganda", but all other unsealed mail from abroad which must be screened.

Where foreign language publications are involved, the screening may take place at a center other than that where the mail is received. Each item found to contain "communist political propaganda" must be checked first to learn if it is addressed to an exempt addressee, then against the lists to determine if it is desired. And only after it is ascertained that instructions have been received from a particular addressee is delivery finally made.

Thus, even though appellant is now listed as entitled to receive literature addressed to him, his mail is subject to considerable delay. And because this detriment is continuing and is not capable of being cured under the procedures established by Section 4008, appellant's claim is not moot.

**B. Appellant's claim challenging the listing procedure is not premature.**

The court below ruled that the portion of appellant's claim which challenged the listing procedure established pursuant to Section 4008 was unripe for decision because, although appellant is concededly listed as a person "desiring" to receive "communist political propaganda," the "threat of future public distribution of the list is not sufficiently imminent \* \* \* " (R. 24, 27).

The fallacy in the lower court's reasoning is its ready assumption that the lists would be kept out of the hands of officials or members of the public who might take action against or stigmatize appellant. As we have already observed (*supra*, pages 23-24), this conclusion is invalid because it is inconsistent with the past practice of those maintaining lists, it is inconsistent with a fair reading of the affidavit filed by the Postmaster General, and it is inconsistent with the political realities of the listing process. There is nothing hypothetical about the danger that the lists will be delivered to other government agencies, that congressional committees may subpoena listed persons, that government agencies may seek to impose sanctions because of the listings, and that there will be a public dissemination leading to community sanctions. As Judge Feinberg said, dissenting below, "there is a sufficient threat of injury to satisfy the requirement of 'ripeness' " because of "the irreparable nature of the threatened injury and the improbability of plaintiff having sufficient notice of public disclosure of the list to allow him to raise his constitutional objections before the injury is inflicted." (R. 32)

This case is thus wholly unlike *Poe v. Ullman*, 367 U. S. 497, which was held not justiciable because of the uncertainty over whether the Connecticut birth control statute would ever be applied to the plaintiffs seeking a declaration of invalidity. Appellant here is listed and subject to disabilities inevitably associated with enforcement of Sec-

tion 4008. For the same reason *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1, is not an inconsistent authority. In that case the Court held that certain objections to registering under the Internal Security Act were premature because the Communist Party had not yet registered. Here the listing is of course conceded.

The ripeness doctrine, which is merely one aspect of the general requirement that the federal courts adjudicate only cases and controversies, is far less rigid than the court below indicated. Thus, in *Adler v. Board of Education*, 342 U. S. 485, the Court adjudicated, without even discussing "ripeness", the merits of the constitutionality of a New York statute making ineligible for employment in any public school any person who advocates overthrow of the government by force despite the absence of any allegation in the plaintiffs' complaint of any imminent danger that they would lose their jobs. See also Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harv. L. Rev. 1122, 1326.

The lower court's failure to recognize the lack of rigidity in the doctrine of justiciability is part of the reason it misapplied the "public interest" rule which permits adjudication in cases where the offending action has temporarily ceased. See, e.g., *United States v. W. T. Grant Co.*, 345 U. S. 629, 632-33; *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37, 43. The other reason for its error is that it considered this rule in connection with the detention of appellant's mail rather than in relation to the listing procedure.

There is no doubt that appellant is listed and the question is the degree to which he will be harmed through the circulation of his name. As to that question there is a substantial public interest in immediate adjudication. In the words of the Court in *Heilberg*, "[T]o render this case moot

under these circumstances is to approve a device which would enable defendants to prevent any potential recipient of mail originating abroad from ever testing the constitutionality of Section 4008." Certainly the "public interest" in the *Walling* and *Grant* cases, *supra*, was no greater than the interest in adjudicating the validity of a dual infringement of First Amendment rights where the Government has taken deliberate action to preclude this Court from ever ruling on the merits.

**C. Appellant has standing to represent third parties in challenging both the detention of mail and the listing procedure.**

Although the court below recognized that there have been "numerous exceptions" (R, 27) to the doctrine that a litigant may not assert the rights of third parties, it concluded, contrary to the *Heilberg* court and Judge Feinberg, that "The present case does not fit within any of the established exceptions" (R. 28).

This ruling is inconsistent with the leading cases in this Court establishing the right to litigate on behalf of third parties. In *Barrows v. Jackson*, 346 U. S. 249, 255-59, a white seller of property was allowed to raise an equal protection claim by potential Negro buyers who were not before the Court because the "respondent is the only effective adversary of the unworthy covenant." 346 U. S. at 259. And in *NAACP v. Alabama*, 357 U. S. 449, the National Association was considered "an appropriate representative" of a class of persons who were loath to assert their rights openly because of the harm that would follow loss of anonymity. See also *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 149-57 (Justice Frankfurter, concurring).

It would be difficult to imagine a case more in line with these principles than the present one. As in *NAACP v. Alabama*, *supra*, prospective litigants are deterred because

of the likelihood of harm that would follow loss of anonymity. And as in *Barrows v. Jackson*, *supra*, appellant is an "appropriate representative" of the class affected directly by Section 4008. Appellant is not merely a taxpayer, as in *Frothingham v. Mellon*, 262 U. S. 447, or a person with nothing more than the "general public's interest in the administration of the law." *Perkins v. Lukens Steel Co.*, 113, 125. His rights under the First Amendment are directly affected by the statute and, in addition, he represents the interests of those deterred from revealing themselves publicly as "desiring" to receive "communist political propaganda." As the *Heilberg* court said, "We do not think a person should be made to suffer social disapprobation in order to assert his constitutional rights." See also *Pierce v. Society of Sisters*, 268 U. S. 510, 534-36; Note, 77 Harv. L. Rev. 1165, 1170.

The Court has taken an appropriately realistic approach to the problem of standing even in cases not involving basic constitutional liberties. *Parmelee Transportation Co. v. Atchison, T. & S. F. Ry.*, 357 U. S. 77; *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470; *Scripps-Howard Radio, Inc. v. FCC*, 316 U. S. 4. Furthermore, it has pointed out that the requirement of strict standing to sue on one's own behalf is "only a rule of practice," *Barrows v. Jackson*, 346 U. S. at 257, and that "justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification," *Poe v. Ullman*, 367 U. S. 497, at 508 and 524 (Justice Harlan, dissenting).

The instant case presents the strongest possible occasion for adjudication on the merits. Not only are fundamental constitutional liberties involved, but appellant has an interest as substantial and direct as those sustained by the Court in other cases. Moreover, to deny appellant standing here would be to permit the Government ingeniously and deliberately to immunize from judicial review a

statute that plainly has the effect of limiting free expression protected by the First Amendment. Such a result would be inconsistent with the basic tradition of judicial review and should not be tolerated by this Court. *Cf. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362.

## CONCLUSION

The judgment of the District Court should be reversed with instructions to enter judgment for the relief demanded in the complaint.

Respectfully submitted,

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